TITLE: IN SEARCH OF THE LAW-GOVERNED STATE

Conference Paper #1 of 17

The Rise and Fall of the Law-Governed State in the Experience of Russian Legal Scholarship

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COUNCIL CONTRACT NUMBER: 805-01

DATE: October 1991

The work leading to this report was supported by funds provided by the National Council for Soviet and East European Research. The analysis and interpretations contained in the report are those of the author.
NCSEER NOTE

This paper is #1 in the series listed on the following page. The series is the product of a major conference entitled, *In Search of the Law-Governed State: Political and Societal Reform Under Gorbachev*, which was summarized in a Council Report by that Title, authored by Donald D. Barry, and distributed by the Council in October, 1991. The remaining papers will be distributed seriatim.
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Executive Summary

The aim of this paper is to examine the development in Imperial Russia of the scholarly debate about the notion of pravovoe gosudarstvo (traditionally interpreted as the counterpart of the notions of rule of law and of Rechtsstaat). The period of time taken into consideration covers the years immediately following the judicial reform of 1864 to 1915.

In particular, the paper investigates:

1. the effects produced by Rechtsstaat/rule of law models on Russian juridical culture, and their implications for the effort to move away from autocracy

2. the dissociation between doctrine and law in action (in particular, the 1906 constitution)

3. the contemporary Soviet approach to the pre-revolutionary discussions of the notion of pravovoe gosudarstvo.

As far as conclusions are concerned, the author suggests that the "stiffness" of Russian positive law prevented the scholarly debate from having much influence on legislative action. The law-based state model, on which legal scholars had been working for years, thus continued until the eve of the October Revolution. In the course of time, however, it withered and aged. Even before it
was fully developed in the political sphere, confidence in the model was undermined by new doctrines such as the sociological analysis of law and Marxist scientific materialism, which attracted the Russian intelligentsia at the turn of the century.
Introduction: Confusion Between Rechtsstaat and Rule of Law

It took Grant Gilmore only a few typically incisive lines to demolish the view of the "rule of law" which holds that it is laws which rule today, and not men. For Gilmore this was a "ridiculous" overestimation of the idea of law. According to him law is an "unstable mass in precarious equilibrium" and, as such, must be continually corrected and updated.¹

Gilmore's comments are made within a common law context, but might just as well refer to the concept of Rechtsstaat which, in the world of civil law, has traditionally performed the same function as the rule of law. For even in the world of civil law, there are legal scholars, Hans Kelsen first and foremost, who deny the idea that Rechtsstaat may be in some way "useful".

The aim of this paper is to examine the development in Imperial Russia of the scholarly debate about the Russian notion of pravovoe gosudarstvo, traditionally interpreted as the counterpart of the notion of rule of law, and Rechtsstaat. The period of time taken into consideration covers the years
immediately following the judicial reform of 1864 to 1915. In reality, as will become clear, the crucial moment of the debate came in the first years of this century and, more precisely, immediately before and after the introduction of the 1906 Constitution. Since the notion of pravovoe gosudarstvo is developed much more fully in the legal scholarship of the period than in practical legal experience, this analysis is based largely on the works of the legal scholars.

Anticipating one of the conclusions of the paper, I suggest that the "stiffness" of Russian positive law prevented the scholarly debate from brimming over into the legislator's reception of the solutions elaborated. The pravovoe gosudarstvo model, which legal scholars had been working on for years, thus continued until the eve of the October Revolution. In the course of time, however, it withered and aged. Even before it was fully developed in the political sphere, confidence in the model was undermined by new doctrines—-the sociological analysis of law and Marxist scientific materialism, in particular—-which attracted the Russian intelligentsia at the turn of the century.

Although I do not share Gilmore's pragmatism entirely, I do agree that the legal state (in its various meanings as Rule of Law, Rechtsstaat and pravovoe gosudarstvo) is a notion, an idée-force, a concept As a concept, in its Rechtsstaat version, it reached its peak thanks to the German Begriffsjurisprudenz. For, as is well known, in the second half of the nineteenth century, German scholarship managed to bestow absolute value upon
a situation as complex as the state-citizen relationship. The concept of Rechtsstaat thus took on a technical-theoretical meaning which is acknowledged as being capable not only of explaining the past, but also of organizing the social set-up enduringly. The German public law school—and in particular the work of Mayer and later of Gerber—created the pattern whereby citizens are holders of subjective public rights (Offentliche subjektive Rechte) in their relations with the State. The new science of administrative law, which applied the scientific method used by Pandectists for private law to the French categories of public law, elaborated in juridical terms the Hegelian idea of the State as a living organism whose life, ends and means are greater than those of the individuals who form it. The State thus became the public entity par excellence: no body superseded it; it was the primary source of juridical rules and its acts were all authoritative.

Within this pattern the aims of the State were made to coincide with the "public interest". Such aims, however, all had to be defined by statute, inasmuch as the State was no longer a body free to act "arbitrarily" like—so the argument went—the Polizeistaat of absolutism. It was now a Rechtsstaat. The term "Rechtsstaat", born to counter the term "Polizeistaat", thus described a relatively simple situation: a state legal system in which the public powers affecting the civil juridical sphere always had to be assigned to bodies on the basis of a legal rule, and implemented in compliance with other rules (generally below
the level of statutes) designed to regulate the exercise thereof. On a technical level, a guarantee was introduced to protect citizens against the abuse of public power. In this way they had the right to request judicial protection against the use of powers not envisaged by or infringing the law. Its proponents thus intended Rechtsstaat to assume a constructive meaning: it was to constitute a principle superior to all those fundamental laws and constitutions attributing guarantees and rights to citizens.

Once the golden age of the German Begriffsjurisprudenz was over, faced with the deformations of the pure theory of Rechtsstaat made by the constitutional monarchies of the era (especially by governments and administrative organs), civil law scholars started to endow the notion of Rechtsstaat with the most varied meanings.

Confusion was augmented by the fact that, as time passed, civil law and common law scholars increased their contacts and mutual interests. For the former it seemed natural to update the notion of Rechtsstaat by drawing on the notion of rule of law, whereas for the latter it was convenient to interpret comments on the Rechtsstaat (or to explain the legal systems of continental Europe) in terms of the presence or absence of the rule of law. Throughout this century we consequently find that Rechtsstaat is interpreted by the various authors:
a) as an equivalent of the constitutional state for its formal guarantees of civil rights;
b) as an equivalent of the state recognizing a system of administrative justice;⁶

c) in the formalist meaning (made famous by Kelsen) whereby state and law coincide so that each state is a law-governed state;

d) as a synonym of rule of law;⁷

e) as a notion founding the entire activity of the organs of the state on the principle of "supremacy of law" (gospodstvo zakona).

These possible interpretations are not only different one from another, but sometimes even contradict each other.

This confusion also originates from the fact that civil law terminology does not possess a satisfactory term to translate and express the notion of rule of law. All the translations which include the term "state" (Rechtsstaat, état de Droit, pravovoe gosudarstvo) are inappropriate in that they misinterpret the essence of the idea of rule of law. There are no historical examples of a "state based on the rule of law". The premise or decisive element of the rule of law is not the state, but rather an autonomous, extra-state law--case law or Juristenrecht. Rule of law thus exists above all without the state, or, more precisely, where the state does not take the production of law upon itself.⁸

The strong link which, during this century, has bound, and continues to bind, the notions of Rule of Law and Rechtsstaat (or état de droit or pravovoe gosudarstvo) may be explained by the
fact that both notions represent different techniques to reach an identical goal: the subordination of political power to the observance of juridical rules intended to safeguard the freedom of citizens. Yet the difference between the two techniques should not be underestimated. While, in complying with the notion of the rule of law, the political power which governs the state is subordinated to a law which it has not directly produced, in the case of Rechtsstaat, the state subordinates itself to its 'own' law. In reality, as Dicey has lucidly explained, "the general rules guaranteed by the Constitution may be, and in foreign countries constantly are, suspended," whereas in systems in which "general rules of constitutional law are results of ordinary judge-made law . . . courts cannot without considerable danger be turned into instruments of government."¹⁰

The problem which comes to the fore, then, is most often one observed on the stage of civil law. If we say that the law-governed state is present whenever the state's activities in respect of its citizens are backed by law, we open the door to a formalistic approach which may, as the Soviets are fully aware, lead to normativism. In this case, nothing prevents the state from giving itself the rules it regards as most "useful," and slogans such as "supremacy of the law" and "observance and strengthening of the principle of legality" are transformed, at best--i.e., wherever there is a system of parliamentary pluralism--into a parliamentary "dictatorship" (that is, of the governing political parties). At worst--i.e., when there is a
single party--these slogans serve solely to legitimize the dictatorship of a single party.

In view of this premise, which seems to me to perform the double function of aiding comprehension of the pages which follow (on the "Rechtsstaat model" and Russian legal scholarship) and of anticipating discussion of the meaning of terms when it comes to comparing the contents of the chapters in this volume, I believe it is possible to identify the aims of this paper in particular with greater precision. It sets out to:

a) observe the effects produced by Rechtsstaat/rule of law models on Russian juridical culture;
b) observe the dissociation between doctrine and law in action (in particular, the 1906 Constitution);
c) observe, albeit more marginally, the comments which Soviet legal scholarship has recently voiced towards the pre-revolutionary elaboration of the notion of pravovoe gosudarstvo, in an attempt to understand to what extent the reference notion for (sotsialisticheskoе) pravovoe gosudarstvo is based on the exceedingly out-of-date notion of Rechtsstaat, as opposed to the still fashionable notion of rule of law.

As to the thesis of this paper, I can only repeat what I anticipated in introducing this premise: namely, that because the doctrinal concept of pravovoe gosudarstvo was not translated into positive law-in-action, the model exhausted its utility with the failure to transform the autocracy into a law-based state. At the end of the last century the faith of old liberals such as Boris
chicherin in the law-governed state was replaced by hopes for a state not only "pravovoe'", but also, and above all, fair, "spravedlivoe".

Dissemination of the Model

Observation of the theory of pravovoe gosudarstvo in Russia thus signifies observation of the problem from the point of view of the dissemination of the juridical model, or of legal transplants, to use the term coined by Alan Watson. The model is external to Russian juridical culture and was rendered objective by the elaboration of the Begriffsjurisprudenz. It is also a "cultural" model, contained as it is in the works of legal scholars, and is non-normative (unlike, for example, the solutions contained in constitutions).

The intelligentsia's reaction to the Rechtsstaat model was not unlike that reserved for the single positive law solutions which occasionally captured the attention of Russian legal scholars. In other words, from Alexander I to Nicholas II, the problem of the reception of foreign law as a means of modernising Russian law suffered under the effects of all the contradictions which influenced to a more general extent the approach to the culture of the West.

Attempts at radical and systematic reception of Western law did not succeed: the Empire was not transformed into a Rechtsstaat, just as the Svod Zakonov was not replaced by organic, rational
laws drawn up by legal scholars (for example, the draft of a civil code). Such failures were, for a long time, attributed by Western Sovietologists as well as by Soviet historians to the absence of a "legal ethos" in Imperial Russia.

Since the second half of the Seventies, and even more so in recent years, Western Sovietologists have corrected that hasty judgement, giving increasing weight to Russian juridical thinking and, in particular, to liberal juridical culture. Walicki, in particular, has operated on two fronts. On the one hand, he has stressed the presence of anti-legalistic attitudes in the Western romantic culture of the nineteenth century; on the other, he has endeavoured to trace the presence of a "juridical world-view" in Russian culture, insisting that disregard for the existing legal order is not the same as disregard for the law.

More recently still, Soviet historians have joined Western Sovietologists in filling previously blank pages with the names of the "liberal legal scholars" of Imperial Russia. To insist, then, that juridical culture had no influence upon the development of Russian society proves to be a blatant historical error. The resulting picture is that Russian juridical culture depended on two different and, to some extent, antagonistic factors: the will of the autocracy and Western models.

One of the most perverse effects of this antagonism was that, in cases in which the will of the Tsar (and subsequently of his government) was hostile towards the reception of foreign models (whether normative or cultural), such hostility not so much
blocked reception as delayed it, or made it occult and fragmentary.\textsuperscript{15}

It thus appears evident that the fear of modernization which overtook Nicholas I after the December uprising, drove him away from the juridical world-view of the Enlightenment which had abundantly nurtured the States of Europe. The emphasis laid on statutes or zakony as opposed to law or pravo left a mark on teaching syllabuses in particular.\textsuperscript{16}

At the level of cultural reception, therefore, the intelligentsia's concern with law began to emerge, as Walicki has acutely observed, "after the breakdown of the juridical world-view in European thought, at a time when such ideas as the social contract, the natural rights of man, and so forth, sounded anachronistic and unscientific, if not hypocritical, and when law was increasingly identified with the positive law of existing states".\textsuperscript{17} This time lapse is, to my view, decisive in explaining the intelligentsia's attitude to law. The idea of the function of law in society and, as a consequence, the idea of the law-governed state, developed in Russia in a century, the nineteenth, which was, according the Gradovskii's definition of one hundred years ago, "sociocentric",\textsuperscript{18} in that interest was addressed to the responsibilities and activities of the state and to the conditions in which such responsibilities were to be undertaken, whereas, in the eighteenth century, the attention of European intellectuals was concentrated on the mechanisms of edification of the state.
Russian scholars who started to look to the Rechtsstaat model from the second half of the nineteenth century onwards thus reflected the spirit of their age. Some regarded the West (and the juridical mechanisms constructed by Western culture) favourably, others unfavourably. The debate which developed between the two groups touched on issues of fundamental legal importance—for example, the relationship between power (vlast') and law (pravo), or the choice of the rules of political representation (the majority for Westernizers, unanimity for Slavophiles).

More precisely, in relation to the subject we are discussing here, it is possible to note that:

a) precisely because no-one in the last decades of XIXth century shared a "blind faith in the reason guiding the lawmaker" any longer, the theory of the law-governed state remained "compressed" between the pragmatic attitude of the positivists and the skeptical refutation of the nihilists (later to be bolstered by the Marxist critique of the bourgeois law-governed state);

b) legal scholars who, despite the "compression" described above, believed in the law-governed state and worked towards the edification thereof, tended to pose the problem of the relationship between vlast' and pravo in terms of the relationship between law and morals;

c) liberal legal scholars who reasoned against the autocracy in moral as opposed to political terms did so paradoxically. On the
one hand, they defended the static principle of natural law as a
means of preserving the status quo; on the other, they
endeavoured to overthrow (in a juridical, non-revolutionary
sense) the latter.

The Cultural Model and the Problem of Distinguishing Between Law
and Morals

The problem of distinguishing between law and morals is crucial
to any definition of the law-governed state, for it embraces the
question of the legitimation of legal rules (hence of power)
"from without the system". The pursuit of an external
foundation reached its theoretical peak with the natural law
school. The idea of the pre-existence of fundamental civil rights
in opposition to state ordinances deprived feudal and later
absolute systems of their legitimation, at the same time exalting
the role of legal scholars (who were called upon to establish the
contents of those civil rights). A second school of thought in
the second half of the nineteenth century set out from the crisis
of the doctrine of natural law to pursue the foundation of law
"in society" (and subsequently in economic factor). This
second school shares the first's impatience with legal
positivism. Unlike the first, however, it eventually exalted
discretionary instruments of law enforcement (general clauses,
equitable assessment of interests, and so forth). In some
situations, such discretionary instruments could be transformed
into vehicles for the introduction of political assessment criteria, and hopes for a "dynamic Rechtsstaat" entailed, in reality, the subordination of the judiciary to the power of the political parties. 20

All the major protagonists of the debate we are examining, with the sole exception of Boris Chicherin, were attracted by the idea of endowing law with an ethical foundation. Authors who had written in favour of the reception of the notion of Rechtsstaat were often labelled en masse as "liberal thinkers," even though their works differed profoundly in terms of political, religious and philosophical conceptions. They included Chicherin himself, Petrazhitskii, Gradovskii, Solovev, Novgorodtsev, Kistiakovskii, Kotliarevskii and Hessen. 21

In reality Boris Chicherin was the only real representative of the "classical" liberal school. He was the only one to argue without uncertainty that civil rights must have priority over political (and, still more, social) rights; the only one to deny any prospect of social engineering through the law, to argue that "every step towards social policy" is a victory for socialism but a defeat for civilised society, 22 and to openly oppose confusion between law and morals. As Walicki has noted, "in Chicherin's interpretation, the separation of the juridical and the moral was not meant to sanctify unjust positive laws, or to eliminate moral considerations from juridical thinking. He rather wanted to say that justice, that is, the moral component of legal consciousness, should not be confused with the ideal of morality
Chicherin, active for the whole of the second half of the nineteenth century, was, in reality, an isolated figure. The idea of law present in his works was no longer felt in the West (where positivism had opened the way to the ideal of the pursuit of the "purpose of law"), nor had it ever been shared in Russia where "cold legal formalism" was denied.

Lesser "extraneousness" to Russian culture and the spirit of the age characterises the writings of Vladimir Solovev, active in the last thirty years of the nineteenth century, and Leon Petrazhitskii, active in Russia from the end of the nineteenth century until October 1917. Both authors devoted their lives to defending the "juridical world-view," but also, albeit for very different theoretical reasons, voiced the contradictions and ambiguities which, as I have said, characterised all Russian legal scholarship (Chicherin apart) and its analysis of pravovoe gosudarstvo. In his oeuvre, Solovev sought a compromise and a synthesis between traditionally contrasting positions, endeavouring to prove the total compatibility between the conception of the state elaborated by German legal scholars and the Christian ideal of justice. In doing so he joined the Russian school, which sought a moral foundation to law, but, at the same time, betrayed that important aspect of Russian culture linking the anti-legalistic spirit to the Christian ideal. His pursuit of synthesis led Solovev to acknowledge the importance of the rights of freedom and ownership dear to classical liberal thinking, but,
at the same time, to augur the state's "moral control" over the exercise of economic activity by private individuals. The state thus became law-governed in the sense that it acted as a neutral mediator between the material world of economic relations and the spiritual world of the values recognised by the church. In this type of state, law encapsulated a minimum of morality: the juridical rules that were not also moral contradicted the very nature of the law itself and had to be invalidated. 26

Like Solovev, and in polemic with the Slavophiles, Petrazhitskii also conceived an idea of law as an evolving phenomenon, changing as social reality changes. He too, therefore, thought of the law-governed state as a solution capable of reducing the risks of the increased variability of law. Unlike Solovev, Petrazhitskii was a professional legal scholar. His contribution to the elaboration of the idea of pravovoe gosudarstvo was the fruit not only of his writings, but also of his political and editorial activity (i.e., the publication of the review Pravo). His link with German juridical culture and, at the same time, the originality of his thinking—which culminated in his famous "psychological theory of law"—are too well known to be summarized in this paper. 27

What concerns us here is to emphasise the following points:

a) Petrazhitskii shared the Russian intelligentsia's hostility towards the notion of positive law;

b) This hostility took on an explicit political significance as a result of his activity at the review Pravo and in the Kadet party; it was precisely in the columns of the review, for
example, that, at the start of the century, he spelled out the view that autocracy is an obstacle to the creation of pravovoe gosudarstvo;

c) Denying the legitimacy of positive law, Petrazhistskii felt compelled to elaborate a new foundation for the validation of law, finding it in the intuitive law of the masses;

d) The answer to the question, "Who voices the intuitive law of the masses?", is "legal scholarship." Petrazhistskii entrusted legal scholars with the task of elaborating, in accordance with this widespread sense of justice, a science of legal policy capable of conveying the educational value of law and its reformist capacity to the full.

If we compare Solovev's utopian syntheses and Petrazhistskii's political surmises with Chicherin's analysis, we note a drastic shift from the idea of pravovoe gosudarstvo as attainment of (formal) civil liberty alone to the idea of pravovoe gosudarstvo as an instrument of justice.

If we reason in terms of model dissemination, we can state that, of the authors sensitive to Western models, the ablest were also well aware of the peculiarities of the Russian political situation. If I emphasize the word political, it means that here I am referring not to the peculiarities of the Russian soul, but rather to the fact that Russia, as it entered the twentieth century, did so with a state structure no longer comparable to any other in the industrialized world. Russian legal scholars had traced changes in the technical notion of Rechtsstaat due to the
dealings of parliamentary governments. When, in 1906, Russia was
given a constitution, the formal cultural models associated with
Rechtsstaat on technical grounds had already given way to the new
models of French sociological jurisprudence.

In the Russian experience this produced a certain ambiguity: we
may wonder, for example, whether there may not be a contradiction
between the science of legal policy which, according to
Petrazhitskii, should provide the legislator with socially
evolving models (hence achieving social engineering through law)
and his liberalism, or between his positive assessment of law
and, all things considered, a somewhat millenarist view according
to which one day law will "exhaust" its "educational
function".

Such questions are not merely academic, inasmuch as we know that
the dialectic between the ideal of evolving law and the practice
of legal normativism has generated in Soviet law all those
general clauses and elastic rules which, in the absence of a
class of independent, technical judges have enabled the
discretionary power of the Party to superimpose itself over the
activity of judges.

The Normative Model. The 1906 Constitution and the Missing Link
Between Theoretical Debate and Political Reality

When the Constitution was introduced in 1906 in enactment of the
commitments undertaken by the autocracy in its Manifesto of
October 1905, the expression pravovoe gosudarstvo had already entered the language of legal scholars and politicians. As is the case with many politically "useful" expressions, it was used to mean different things by the right, the left and the moderates. It was clear at the Government level that the causes of the social revolt of 1905 had to be blunted by granting recognition to the program for civil rights legislation put forward by the liberals. Thus the Prime Minister himself, Stolypin, declared before the Duma in the summer of 1906: "We need to turn our homeland into a state based on law, because until the rights and duties of individual Russian citizens are defined by written law, these rights and duties will be dependent on the interpretation and the whim of individuals." Even before Stolypin, Witte had made a political opening towards formal recognition of civil rights. At a government level, we thus discover that pravovoe gosudarstvo was interpreted instrumentally to support the autocracy. And, indeed, the text of the 1906 Constitution clearly shows that its drafters were guided not so much by the theoretical models discussed by legal scholars as by the political necessity for timid (non-irreversible) reform. Thus, one of the cardinal principles of the classic Rechtsstaat model, that of the separation of powers, was denied by Articles 8, 9, 10 and 11 of the Constitution: the principle of the supremacy of the law may have been affirmed in Article 84, but it was subject to the considerable exceptions laid down by Articles 86 (the need for the Emperor's sanction to the new laws), 87 (interim
bills), 3196 and 97 (the Tsar's special jurisdiction in the fields of naval and military legislation). As to the political liability or otherwise of Ministers, this was confined to interpellations (zaprosy) and inquiring questions (voprosy) and was further limited by the Sovereign's total non-liability as laid down by Article 5. 32

Moving on to civil rights, Chapter VIII of the Constitution ("Rights and Duties of Russian Subjects") formally recognized the category of fundamental personal rights--personal inviolability, freedom of circulation, freedom of gathering and association, freedom of speech and freedom of religion. The entire category of guarantees was, however, achieved "concretely" only by reference to the "manner determined by law". This eventually caused a shift in the nature of the problem. At first, prior to or immediately following the Constitution (see the Rules on the position of religious minorities of April 1905, the "temporary rules" on the right of association of March 1906, the rules providing the abolition of preliminary censorship), there was an improvement with respect to the system provided by the Fundamental Rules of 1832. Subsequently the government's (and the Sovereign's) counter-reforming policy, which became explicit as of 1909, exploited the possibilities offered by the rules of the Constitution to return civil rights to the pattern of the Polizeistaat, 33 and left their implementation to the discretionary power of the administration. The reform program was
abandoned in a series of ways: the vetoing by the State Council or by the Emperor of bills passed by the Duma, the failure to confirm temporary rules already implemented, the boycotting or non-implementation of guaranteed rights by the bureaucracy, the Ruling Senate's complacency towards the government's infringement of the interim legislation.

Instead of providing the Russian Empire with a springboard for the creation of a pravovoe gosudarstvo, the 1906 Constitution revealed all the state's juridical, administrative and political shortcomings. Many saw clearly that the Constitution could not serve as a valid starting-point, since the power of secondary sources of law typical of the Polizeistaat had not been annulled. Both the institutions created in 1906 to reduce the power of the government and of the Sovereign and the Duma itself soon revealed themselves to be encumbrances, in order to overcome which the government started to resort ever more frequently to formal "tricks" and blatant illegality. In a historical period of widespread disillusion with the mechanisms of formal constitutionalism, all this contributed to exacerbate the disillusionment with the mechanisms of law.

The Crisis of the Model

Between the 1880s and the years prior to the First World War, European legal scholars, Russians included, all shared a style of writing and an approach to the subject that might be described as
"historical and comparative legislation." The most meager of domestic law studies never failed to reconstruct the history of juridical institutions and examine the relative positions of the various systems. In works of juridical theory, and in particular in works about the state, the starting points were always Plato and Aristotle, with Rousseau and Montesquieu providing a compulsory pause for thought prior to arriving at the Germans. This style assumed a peculiar function in the Russian context. For by exploiting evolutionary analysis and the system of the historicization of forms of government, Russian scholars were able to launch an implicit attack upon the autocracy.

An example of the application of this method is the oeuvre of P.I. Novgorodtsev, active in Russia as a professor of law and later as a leading member of the Kadet Party from the end of the nineteenth century until 1918. A disciple of Chicherin, Novgorodtsev revealed through his writings that he belonged to the generation subsequent to that of his mentor. He also had faith in law as an instrument for the protection of liberty, blaming juridical positivism (not the idea of law per se) for the anti-legalistic consciousness widespread in Russia. Yet his writings display a mixture of criticism and skepticism lacking in the works of Chicherin. For Novgorodtsev the idea of Rechtsstaat was founded historically on two principles: that of "sovereignty" and that of "individualism". Both principles showed signs of crisis at the start of the century. The crisis of the first is essentially the crisis of representative democracy, the cost of
which must be debited to the political parties' management of power. The crisis of the second manifests itself in socialist-oriented (or also solidaristic-oriented) interpretations of democracy. Paradoxically, the interplay of the two factors helped, on the one hand, to augment criticism of the organization of the state in the collective consciousness and, on the other, to increase general expectations from the government's "social" initiatives. 37

Alongside this primarily political "crisis," Novgorodtsev highlighted the "cultural" crisis in legal thinking with an extreme wealth of detail. In his 1909 work Krizis sovremennago pravozsoznania he records not only the decline of Enlightenment faith in the rational omnipotence of the legislator and the deterioration of those "faiths" (in the "general interest", in the representative institutions of the state) which had nurtured "the apotheosis of the state," but also the loss of prestige of models elaborated by the begriffsjurisprudenz. As he witnesses the decline of the German model, Novgorodtsev also observes the English rule of law model. The considerable lucidity of his analysis induces him once more to point out the risks inherent in the dissemination of a juridical model which had sprung up in a political reality extremely different from the Russian and continental ones. Indeed, he goes on to note the damage which the dissemination of theories born of common law culture created in the world of civil law. 38

Novgoredstev's works appear more fertile in their criticism than
in their propositions. The author's liberal training prevents him, unlike his contemporaries, from opening favourably to the abandonment of the notion of the law-governed state. His critical spirit prevents him from assuming a pragmatic position such as those held by Kotliarevskii and Vinaver. Novgorodtsev too was ultimately a victim of the "ethical problem of law," and an isolated thinker. His warning not to implement blindly the model of the sovereignty of political parties is mislaid amidst the indifference of the moderates, attracted precisely by that model of political organisation, and of left-wingers, for whom parliamentary democracy was, in any case, instrumental to the setting-up of a socialist society.

A different destiny lay in store for a contemporary of Novgorodtsev's, Bogdan Kistiakovskii. Like Novgorodtsev, Kistiakovskii believed that law could guide social development and, also like Novgorodtsev, he set out to make a historical reconstruction and comparison of forms of government. This work provided the grounds for a violent attack on the autocracy. Unlike Novgorodtsev, Kistiakovskii supplied a positive solution to the evolution of human society. Albeit a non-Marxist, Kistiakovskii shared with Marxists the faith which Novgorodtsev lacked. The shift from the oldest forms of government to the most recent is seen prospectively as an "objective and ineluctable improvement". It is thus history itself which condemns the autocracy to make way for the law-governed state. Yet it is also history which demonstrates that the law-governed state has been
achieved imperfectly in bourgeois parliamentary democracies. The problem is a transitional one: for the future appears the ideal model, the сotsialisticheskое pravovoe gosudarstvo, which will guarantee the effective accomplishment of human and civil rights.

This brief synopsis of Kistiakovskii's thinking on the problem of the law-governed state is based on an essay devoted expressly thereto: "Gosudarstvo pravovoe i сotsialisticheskое" , which appeared in 1906 in the journal Voprosy filosofii i psikologii (No. 5, 469). In this study Kistiakovskii feels the need to justify his own defense of the state and to firmly affirm, against the various exponents of anti-legalism, that a "kul'turnyi chelovek" cannot exist if not within a state structure, insofar as "the law-governed state is the highest form of social organisation ever elaborated by man as a concrete reality."

Yet Russian man was unconscious of this. For the intellectual as for the peasant, the state was "an economic organisation of forces and patrimonies for the exploitation of the less well-off, the culprit of war and famine." But, following Kistiakovskii this view was destined to become a thing of the past, and the government, "which accuses society of conniving with anarchy," but which, in reality, "has brought anarchy to a society which is tending to organise itself, closing political clubs, dissolving trade union organisations, instituting court martial, was destined to surrender its powers to an elected representative government, just as politseiskое gosudarstvo was
necessarily destined to turn into pravovoe gosudarstvo.

It did not escape Kistiakovskii that the social and economic structure of the ideal socialist state had been the object of study and analysis much more than the juridical structure. Nor did it escape him that pravovoe gosudarstvo was often described as "bourgeois" and offered as an alternative to the "socialist" state.45

Kistiakovskii's objective was thus to construct a "juridical theory" of the socialist state based on the irreversible principle of the continuity between the latter and pravovoe gosudarstvo.46 "If the socialist theory of capitalism as the forerunner of socialism, of which it lays the bases through its peculiar organization of the economy, is valid," he wrote in 1906, "then it seems to us possible to interpret the law-governed state as the direct forerunner of the socialist state."47 The feature distinguishing the (bourgeois) law-governed state from the socialist law-governed state is seen as residing in the removal of economic anarchy. As to how the latter is to be removed, Kistiakovskii declares that he can only answer "roughly," since socialist edification "exists only as an ideal and has yet to be achieved."48 For him there was no doubt, however, that "most of the institutions of the socialist state will be founded on the model of the institutions of the law-governed state... The organization of the state and the removal of anarchy will be achieved with the same means adopted in the juridical, political and social life of pravovoe
The socialist state was thus to be founded upon the system of subjective public rights (here the influence of Jellinek and his theory of the subjektive offentliche rechte are patently clear), whereas the category of social rights was to partner that of freedom and political rights. Of the social rights, particular importance was to be attached to the right to work, the right of every person to use the land and means of production, the right of every person to share in cultural and material wellbeing (here the reference to Menger and his theory of the right to the full product of labor is explicit).

The evolution of the idea of pravovoe gosudarstvo culminates in the works of Kistiakovskii. In his writings, Kistiakovskii, on the one hand, stimulated the intelligentsia to maintain faith in the law-governed state and political parties to improve the "semi-constitutional regime" provided by the 1906 Constitution: on the other, he undervalued the original notion of pravovoe gosudarstvo, assigning it an instrumental meaning with a view to the edification of the socialist state. "Pravovoe gosudarstvo", he wrote in 1906, "iaavliaetsia shkoloi i laboratorei, v kotoroi vyrabatyvalutsia uchrezhdenlia budushchago sotsial'nago stroia. Priznav eto, nado nauchitsia tsenit_' pravovoe gosudarstvo i dorozhit_' im."51

The positive response to the crisis transformed the classical technical model into a political one. While maintaining faith in law, this last model sought legitimation for positive law in the protection of workers' rights, thus underestimating "bourgeois..."
Conclusion: Soviet Views on Pre-revolutionary Pravovoe Gosudarstvo

"If anyone talks seriously about pravovoe gosudarstvo, or, worse still, applies the notion "pravovoe gosudarstvo" to the Soviet state, it means he deviates from Marxist-Leninist teachings on the state."

This is the sentence with which Kaganovich unceremoniously buried pravovoe gosudarstvo. Pashukanis echoed Kaganovich, affirming that the "The law-based state is a mirage, but a mirage always useful for the bourgeoisie, because it substitutes religious ideology, it conceals to the masses the reality of bourgeois rule." 

Soviet hostility towards pravovoe gosudarstvo was rooted in the idea, already shared by part of the intelligentsia, of the law-based State as a solution typical of bourgeois authority. This idea caused the refined research of Novgorodtsev and Kistiakovskii to be ignored, together with their attempt to strike a compromise between observance of the law and the need for welfare. Revolutionary impetuosity labelled non-Marxist Russian legal thinkers en masse as reactionaries.

In the post-Stalinist period consideration of pre-revolutionary legal scholars and their theories of the relationship between state and law has generally been confined to special researches on the history of law. The picture painted is neither accurate
nor detailed. For Zor'kin, pre-revolutionary legal scholars were slightly more backward than the intelligentsia, incapable of coming to terms with the fact that their model of the "capitalist constitutional state" had already been superseded in Europe by socialist ideals or that social development would be the result of the "revolutionary changing of material conditions" and not of the action of juridical-formal mechanisms.55

More recently, in the Gorbachev era but prior to the XIXth Party Conference of 1988, it was possible to note a substantial change in approach. As early as 1987 a number of authors protested against the restrictions placed in the past upon a scientific, prejudice-free examination of pre-revolutionary scholarship, suggesting a review of the cultural links between the work of pre-1917 scholars and that of Soviet doctrine.56 Later, when the XIXth Party Conference relaunched the juridical analysis of the notion of pravovoe gosudarstvo, both the more general historical works57 and specific studies of particular issues58 concentrated on the notion of pravovoe gosudarstvo itself. The idea which is generally repeated today is that it was a mistake to ignore pre-revolutionary legal scholarship with regard to some of the principles elaborated thereby, in particular that of the sovereignty of law embedded in the notion of the law-based state. This notion is now seen to embody universal values ("obshchechelovecheskie tsennosti") which must enter the practice of socialist society.59
My impression, however, is that, although discussion about the pre-revolutionary past and the restrictions on references to it have been overcome, although contemporary writers on pre-revolutionary scholarship devote attention to the authors of the past (and, in particular, to one of them, Kistiakovskii, and his theory of "sotsialisticheskoe pravovoe gosudarstvo"), the model of pravovoe gosudarstvo is sought not in the past, but in the present. Historical works excluded, citations of Russian "liberal" theories are few and far between or else are superficial. Moreover, in terms of their content, it must be pointed out that Soviet legal scholars make the following equations: the bureaucratic-administrative system to be supplanted was founded upon the formal principle of legality (zakonnost'); this principle was infused with the command theory of classical normativism; "liberal" scholars fought classical normativism in the name of natural law; the pursuit of an extra-positive foundation for law is thus seen as commendable. Here we see a clear relinquishment, not only of normativist temptations but also of opposition to the use of elastic criteria by the legislator. Today Soviet legal scholars claim the power to fill the dukh zakona (the spirit of the statute) with technical contents. On a more concrete level of research, they are partnered by those scholars who, while continuing to confuse law-governed state with rule of law, look to foreign constitutional models for those technical rules (constitutional control of legality, precise definition of the jurisdiction of
judicial power, etc.), which, together with the "political" autonomy of the judiciary, give rise to the law-based state and guarantee the survival thereof.
NOTES


2. The expression "'legal scholarship'" is used here in a broad sense, inasmuch as many of the authors cited wrote not only in the fields of juridical theory and technique, but also of politics, philosophy, religion and ethics.

3. In his study of the problem of *pravovoe gosudarstvo*, S.A. Kotliarevskii writes that, "*Pravovoe gosudarstvo* belongs to the world of ideas [otnotaisia k miru idei]. It is an ide^'ee-force, and the dogmatic scholar is entitled to pay it no attention whatsoever. The dogmatic scholar feels rightly that if he starts to think about *pravovoe gosudarstvo*, he will inevitably be led into the sphere of morality, philosophy and history: somewhere beyond the boundaries of 'iurisprudentsiia' as such." *Vlast_i pravo, Problema pravovogo gosudarstva*, Moscow 1915, 44.

As to the problems which the exaltation of the theoretical aspect may induce in a society, it is worth recalling the words of sociologist N. Luhmann: "'The experiences of developing countries in particular have demonstrated that the proclamation of constitutions and the elaboration of model-inspired laws do not suffice by themselves, that it is not solely a question of rightful principles and values inherent in the Legal State and that, moreover, not even the long-term educational process of a body of officials inspired by sentiments of faithfulness to the
law is very effective. Other social premises must be satisfied: they range from the type of family structure . . . to procedures generalising interests in political relations.'

See Stato di Diritto e sistema sociale, Naples 1978, 39; (the German version was published in 1971).

4. See also V. Scheuner, "Begriff und Entwicklung des Rechtsstaates!", in Macht und Recht: Beitrage zur Luterischen Staatslehre der Gegenwart, Berlin 1956, 76.


6. For such authors the expression Polizeistaat takes on the rather distasteful meaning "arbitrary police State." The meaning originally given to the term--based on the French "Etat bien policé"--was altogether different.


10. Ibid. 110.


13. See A. Walicki, op. cit. note 7, in particular 33-83.
14. See, for example, V.N. Kudriavtsev, E.A. Lukasheva, "Sotsialisticheskoe pravovoe gosudarstvo", Kommunist 1988 No. 11, 49. See also the works cited below in notes 56 and 57.

15. Tome X of the Svod Zakonov abounds in examples of occult reception. Most of the rules on contractual liability, for example, were constructed by Speranski from the rules of the French Civil Code and solutions elaborated by legal scholars (Pothier, in particular). The occultness resides in the fact that Speranski preferred to explain the origin of those rules of the Svod making a mystifying reference to the traditional Russian rules contained in Polnoe sobranie and not to the French model.

16. Wortman op. cit. note 12, 43 reminds us that after the December uprising, "courses in natural law were banished from the law curriculum and the students were to occupy themselves instead with the mastery of the details of Russian legislation."

17. A. Walicki, op. cit. note 7, 33-34.


Of course the names cited in the paper refer to the main protagonists in the debate. Also worthy of mention are the names of all those legal scholars active in the field of gosudarstvennoe (or konstitutsionnoe) pravo who have written occasionally about the Rechtsstaat model. See, for example, A. I. Elistratov, Ocherk gosudarstvennogo prava (konstitutsionnogo prava), Moscow 1915; B. E. Nol'de, Ocherki russkogo gosudarstvennogo prava, St. Petersburg, 1911.


24. Chicherin was conscious of the dissociation between his oeuvre and the spirit of his times, attributing it to the crisis of liberalism and the decline of legal consciousness. See A. Walicki, op. cit. note 7, 144-145.


26. "In defining law as the enforceable minimum morality," writes Walicki op. cit. note 7, 201, "Soloviev was of course endorsing the use of external compulsion by the apparatus of the state. In doing so he was consciously challenging Tolstoy's view that moral good is incompatible with the use of force. Without a
socially enforceable minimum morality, he argued, all striving towards higher moral values would simply be impossible.'"  
29. In reality, the political documents of the liberal movement between 1902 and 1905 (see, for example, the review Osvobozhdenie, founded abroad by Struve in 1902) refer to pravovoe gosudarstvo in a sense not confined merely to acknowledgement of civil rights, but also including substantial institutional reforms, such as the supremacy of the representative assembly, the latter's control over government business, the civil and criminal liability of civil servants for violation of the law, the independence of judges. See S. Hessen, "Teoriia pravovogo gosudarstva," in Politicheskii stroi sovremennykh gosudarstv: Shornik statei, vol. 1, St. Petersburg 1905, 135; N.N. Palienko, "Pravovoe gosudarstvo i konstitutsionnalizm", Vestnik prava 1906 No. 1, 31.  
31. As in any system which recognizes the Government's power to issue emergency legislation, in Russia too the Government interpreted "emergency" very loosely. "The vast majority of the sixty decrees issued on the basis of article 87 during the inter-Duma period of 1906-1907," writes Szeftel op. cit. note 28, 303, "hardly met the requirements of emergency." Criticism of the infringement of the interim legislation and a reminder of the provisional nature of those sources may be found in B.E. Nol'de, Ocherki russkogo gosudarstvennogo prava, St. Petersburg 1911, especially Chapter 1.

32. See S.L. Levitsky, "Interpellations according to the Russian Constitution of 1906", Slavic and East European Studies 1956-57, No. 4, 220.

33. Of these especially worthy of note is the "Ordinance containing measures for the protection of the State order and public tranquillity" of August 14 1881. According to Szeftel, "under this ordinance the administrative authorities were given police privileges which transcended all separation of powers and in many ways counteracted the normal legislation in regard to anything which had even a remote implication of political action." (op. cit. note 28, 237).

The contrast between formal constitutional guarantees and the nullification thereof by inferior sources of law is stressed by N.I. Palienko, Osnovnye zakony i forma upravleniiia v Rossii, Iaroslavl' 1910. Palienko's political criticism is disguised as formal criticism in the way in which it stresses the non-
correspondence between the juridical language of the Constitution and that of the old rules.

34. See N.I. Palienko, op. cit. note 33.

35. See, for example, A.D. Gradovskii, Gosudarstvennoe pravo vazhneishikh evropeicheskikh derzhav, Moscow 1885, 1886, 2 vols.; A.V. Romanovich Slavatinskii, Sistema russkogo gosudarstvennogo prava v ego istoriko-dogmaticeskom razvitii, sravnitel'no s gosudarstvennym pravam zapadnoi Evropy, Kiev, St. Petersburg 1896; N.M. Korkunov, Sravnitel'nyi ocherk gosudarstvennogo prava inostrannykh derzhav, St. Petersburg 1890. See also the detailed monograph by S.A. Kotliarevskii, Vlast' i pravo, op. cit. note 3, in which the problem of the relationship between power and law is reviewed first in relation to the theses of classical and Enlightenment philosophers, then to the decisions implemented in Germany, France and England.

36. See A. Walicki, op. cit. note 7, 312.

37. See P.I. Novgorodtsev, Krisis sovremennago pravosoznaniia, Moscow 1909.

38. Nineteenth-century legal positivists, such as Austin and Bentham, Pollock and Bryce, abandoned the idea of royal absolutism but remained faithful to the doctrine of state absolutism, transforming it into a doctrine of unlimited sovereignty, according to which the state, irrespective of its form, is the only source of law, wherefore its power cannot be legally limited. It is usually limited in practice by the balance of forces or by the power of tradition, but not by the rights of
the individual . . . English jurists could afford to ignore the problem of the legal limits of state power, because the power of the British Government was limited by the facts of life and nobody felt threatened by it. Nevertheless, theories have their own autonomous logic and the logic of the English variety of legal positivism has been extremely dangerous and destructive.' This synthesis of Novgorodtsev's opinion of the problem of the rule of law model--is made by A. Walicki op. cit. note 7, 313, with reference to the article "Gosudarstvo i Pravo" in Voprosy filosofii i psikhologii, 1904, no. 4, 397 (emphasis added).

39. Kotliarevskii's pragmatism emerges not only from op. cit. note 3, but also from the detailed monograph Pravovoe gosudarstvo i vneshnaia politika, Moscow 1909. Here, after liquidating classical theories on the relationship between power and law, defining them as "old coins that have passed through so many hands it is now impossible to understand their value" (p. 2), he argues that the slogan "from an empire of force to an empire of law" dear to all those concerned with pravovoe gosudarstvo is ingenuous and wrong in that, in states in which the relations between power and citizens are highly formalized, individuals never have the possibility of influencing state policies and the state preserves a field of action in which force has the upper hand over law both in domestic and international relations. As to the constructive side of his work, Kotliarevskii feels that limits to the exercising of state power may be effectively constructed through a rigorous theory of the sources of law and


55. V.D. Zor’ kin, op. cit. note 54, 120.

56. See V.V. Sonin, V.P. Fedorov, ’’Pravoponimanie v dorevoliutsionnoi nemarksistkoi iuridicheskoi mysli Rossii’’, in Gosudarstvennyi stroi i politiko-pravovye idei Rossi vtoroi poloviny XIX stoletiia, (M.G. Korotkikh, V.V. Iachevskii eds.), Voronezh 1987, 60.

57. See, for example, E.V. Kuznetsov, Filosofiia prava v Rossi, Moscow 1989.

58. See, for example, A.G. Gorin, ’’Iuridicheskie obshchestva dorevoliutsionnoi Rossi’’, SGiP 1989, No. 7, 117, which stresses the international contacts of associations and their involvement in the debate on the constitutional monarchy in the years 1905–1907.

59. For example, O.F. Skakun, op. cit. note 21, 113.
60. See *ibid.*, 117.


63. See S.V. Bobotov, D.I. Vasil'ev, "Frantsuzkaia model' pravovogo gosudarstva," *SGG* 1990 No. 1, 105. It is worth noting that, in addition to observation of foreign technical models, Soviet doctrine might also consider foreign doctrine which, generally speaking, a century on, shares the feeling of the "crisis" of the idea of the law-governed state. The problems of the power of political parties in parliamentary assemblies, denounced by Novgorodtsev a hundred years ago, have by no means been resolved in the practice of Western democracies. On the contrary, they have worsened. We can also consider the fact that today the very notion of objective interpretation is in crisis and that many in the West believe that law can no longer be communicated adequately and effectively because its huge mass of component rules. In my opinion all that constitute a narrow but necessary passage for the further evolution of a law-governed state.